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SAMUEL COHEN

IN THE UNITED STATE DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. CR-10-0547
)	
Plaintiff,)	DEFENDANT SAMUEL COHEN'S NOTICE
)	OF MOTION AND MOTION TO VACATE
vs.)	DETENTION ORDER AND TO ADMIT THE
)	DEFENDANT TO BAIL ON REASONABLE
SAMUEL COHEN,)	CONDITIONS
)	
Defendant.)	Date: October 19, 2010
)	Time: 10:00 a.m.
)	Place: Honorable Susan Illston
)	

PLEASE TAKE NOTICE that on October 19, 2010, at 10:00 am, or as soon thereafter as the matter may be heard in the courtroom of the Honorable Susan Illston, defendant Samuel ("Mouli") Cohen, by and through his counsel of record, will and hereby does move this Court to vacate the detention order entered by Magistrate Nagle on August 12, 2010, in the Central District of California, and for an Order admitting Mr. Cohen to pretrial release on reasonable conditions.

1 This motion is based on the instant notice, the attached memorandum of points and
2 authorities in support of this motion, all applicable Constitutional, statutory and case authority, and
3 such other evidence and arguments as may be presented to the Court at the hearing on this motion.
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5 Dated: October 6, 2010

Respectfully submitted,

6
7 s/ William L. Osterhoudt
8 WILLIAM OSTERHOUDT,
9 Counsel for Samuel Cohen
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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

On July 15, 2010, the grand jury returned an Indictment charging Samuel Cohen with nineteen counts of wire fraud in violation of 18 USC § 1343, and thirteen counts of engaging in monetary transactions with criminally derived property, in violation of 18 USC § 1957. These allegations grew out of investments made by various persons in shares of Ecast, a business founded by Mr. Cohen and others, which provides internet enabled music, games and information to bars and restaurants nationwide. Beginning in September 2002, Mr. Cohen is alleged to have made false or misleading representations to investors regarding a planned acquisition of Ecast by Microsoft Corporation, an acquisition which would have boosted the value of Ecast stock, but which never took place. Having lost money on these investments, investors filed civil lawsuits in San Francisco Superior Court against Mr. Cohen and others in 2009, claiming that they were defrauded. The charges in the Indictment mirror the allegations made in the civil suit. These charges do not appear to be well-founded and, in any event, Mr. Cohen is clearly entitled to pretrial release on conditions sufficient to reasonably assure his appearance when required.

II. Background of the Present Charges

The present prosecution grew out of the civil actions filed against Mr. Cohen and others in San Francisco Superior Court beginning in 2009. In addition to claiming that Mr. Cohen defrauded the purchasers of Ecast shares by falsely representing that Microsoft would acquire the company, plaintiffs in the civil actions alleged that Mr. Cohen obtained \$22 million from the same investors by falsely telling them that regulatory approval of the Microsoft-Ecast deal in the United States and Europe required these expenditures. Mr. Cohen denies these allegations and the evidence belies them. The acquisition by civil plaintiffs, including Hari Dillon, of Ecast stock

1 motion pictures. The security agreements and note purchase agreements through which these
2 investments were effected contained no mention whatsoever of Ecast or Microsoft, and they
3 appear to be straight forward investments by the complaining witnesses, made following full
4 disclosure of all pertinent details and risk factors involved. Attached to this memorandum as
5 Exhibit "D" are documents disclosing these full risk factors and releases with respect to ProCinea.
6 In other words, the individuals now accusing Mr. Cohen knowingly and intentionally acquired, for
7 value, promissory notes convertible into an interest in ProCinea, which they actively sought.
8 These individuals betrayed no dissatisfaction with Mr. Cohen until they became disappointed by
9 the result of their investment, a risk that they readily and knowingly accepted when they acquired
10 this interest.
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13 For a long time the principal plaintiffs in the civil suits, through their lawyers, sought to
14 enlist the prosecutorial powers of the government in their actions against Mr. Cohen. Learning of
15 these efforts through discovery provided in the civil case, Mr. Cohen's counsel repeatedly
16 contacted federal authorities to learn whether any investigation was pending and to offer Mr.
17 Cohen's cooperation. These overtures by Mr. Cohen's counsel, initially Marshal Grossman, and
18 later Tom Nolan of the Skadden firm, took place over a long period of time. But the only
19 prosecutorial and FBI contacts counsel were aware of from the civil litigation denied involvement
20 and professed not to know whether an investigation was even pending. The declaration filed by
21 Mr. Nolan in the Los Angeles proceedings before the Magistrate is attached hereto Exhibit "E."
22 Meanwhile Mr. Cohen continued his full cooperation with an SEC investigation of the same events
23 that underlie the civil litigation and the present Indictment. Between August 2009 and June 2010,
24 Mr. Cohen made three voluntary productions of requested documents concerning these
25 transactions and submitted to a full day of interrogation by the SEC staff. On August 3, 2010, Mr.
26 Cohen's counsel was notified that the SEC case had been closed without any action taken against
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1 him. Exhibit “F” to this motion is the letter reflecting this closure. In other words, the SEC, the
2 government agency specifically charged with enforcing laws against the fraudulent sales of
3 securities, fully investigated these claims, heard from Mr. Cohen, and closed the case.
4

5 On July 12, 2010, Mr. Cohen participated in a mediation of the civil cases in San
6 Francisco. At that time his counsel became aware that Agents were in and about the building
7 where the mediation was occurring, with a view to possibly making an arrest. Mr. Cohen, who
8 participated in the mediation from his counsel’s nearby offices, was made fully aware of the
9 situation. But no attempt was made to apprehend Mr. Cohen. At the conclusion of the
10 proceedings, he left the building and returned to his home in Los Angeles, without any effort
11 having been made to arrest him. He continued to reside in his home, attempting to be fully
12 available and cooperative, for the next 24 days. On August 5, 2010, however, Mr. Cohen was
13 arrested in Los Angeles on the charges in this Indictment, which had been returned in this District
14 on July 15, 2010. He was arrested on a busy Los Angeles thoroughfare through “swat team”
15 tactics, featuring approximately twenty federal agents and local police officers, who arrested the
16 defendant at gun point as a helicopter hovered overhead. In spite of his lawyer’s communications
17 to federal law enforcement and the US Attorney’s Office, Mr. Cohen was never afforded an
18 opportunity to self-surrender. Instead, the government staged an unnecessary confrontational
19 arrest of Mr. Cohen and then sought his detention as a flight risk.
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23 On August 12, 2010, a detention proceeding was held before Magistrate Judge Nagle, in
24 the Central District of California. (The transcript of that proceeding is attached to this Motion as
25 Exhibit “A;” the audio recording of the proceeding is also being filed with the Clerks Office for the
26 Northern District of California). At the conclusion of the hearing, Magistrate Nagle denied Mr.
27 Cohen pretrial release, finding that he posed a risk of flight and an “economic danger” to the
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community, and that no condition or combination of conditions of pretrial release could be fashioned which would insure Mr. Cohen's appearance as required.

We now seek this Court's review because the government failed to carry its burden under 18 USC § 3142 (the "Bail Reform Act"), the evidence relied upon by the government was unsubstantiated and unreliable, and the Magistrate's Court indulged in inferences were not supported, even by a preponderance of the evidence. Mr. Cohen's family, friends, business and philanthropic associates are in full support of him, and he does not pose a risk of flight. Furthermore, the case against Mr. Cohen is neither as serious (in terms of the ultimate potential sentence involved) nor as strong (from an evidentiary perspective) as the government led the Magistrate to believe. We propose conditions of release which are more than adequate to insure that Mr. Cohen will honor his obligation to appear in this Court to defend this case. In fact, Samuel Cohen looks forward to his day in Court, when he will be able to vigorously defend the charges against him.

III. Mr. Cohen's Personal History and Character

Samuel ("Mouli") Cohen is a 52 year old man who was born and raised in Jerusalem, Israel. Mr. Cohen immigrated to the United States in 1987, and became a naturalized citizen in 1996. He met Stacy Cohen in 2000, and in 2003 they were married. (A letter from Stacy Cohen is attached as Exhibit "G"). The couple was living in Los Angeles, California at the time of Mr. Cohen's arrest. Mrs. Cohen has written to the Court describing her loving relationship with her husband and the pain exacted by his absence. She also speaks movingly of the Cohens' charitable and philanthropic activities, which bring joy to their lives. Samuel Cohen also has two children from a previous marriage, Roi (age 22), who recently graduated from college, and Danielle (age 19), who is still in school. Roi and Danielle both live in New York with their mother, Yael. (Letters submitted by Roi, Danielle, and Yael in connection with the Los Angeles detention

1 hearing are resubmitted here, along with more recent letters written to this Court by Roi and
2 Danielle, in Exhibit “H”).

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4 As these letters describe, Mr. Cohen is fortunate to have a tight-knit and warm family
5 structure, in which his presence and support this past month has been sorely missed. Mrs. Cohen
6 sincerely describes the pain and sadness that has resulted from Mouli’s absence. As these letters
7 also attest, throughout his children’s lives, Samuel Cohen has been a caring and engaged parent to
8 Roi and Danielle. Roi describes his father’s strong positive influence, imbuing him with the need
9 for honesty and respect for the law. He writes emotionally of his father’s “compassion and
10 generosity as well as concern for others less fortunate.” Yael Cohen stresses the great heart of her
11 former spouse. “Even as my ex-husband, I hold nothing but treasured memories of him and his
12 kind and giving personality.” She writes that as a child, Mr. Cohen “didn’t have much, and it was
13 his ultimate goal that if he was ever to be in a position to help others he would make it his number
14 one priority in life.” Danielle describes her father as “the most altruistic person I have known my
15 entire life,” who “always gave his love and care to his family and those who were in need.” It is
16 particularly sad and distressing that Mr. Cohen’s mother, who lived in Israel, passed away in
17 recent days. The elder Mrs. Cohen had experienced illness and was undergoing medical care, but
18 her death at this time was tragic and unexpected. Mouli Cohen is incredibly distraught over the
19 passing of his mother during his period of seeming helplessness and incarceration.
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23 One of the foundations of Samuel Cohen’s life is his faith. He and Stacy practice a kosher
24 lifestyle, and are very involved in Jewish community events. Letters provided to the Court in
25 support of Mr. Cohen’s release on reasonable conditions by Rabbis Yosef Langer, Shmuel
26 Naparstek, Danny Cohen and Asi Spiegel underscore Mr. Samuel Cohen’s steadfast presence in
27 his religious community and the respect that he has earned in that venue. (Letters of Rabbi Langer,
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Rabbi Naparstek, Rabbi Cohen and Rabbi Asi Spiegel are attached to this motion as Exhibit “I”).

As Rabbi Josef Langer eloquently expressed:

“Even in the face of judgment against him, I personally can vouch that Mouli is a man of high character and integrity. Mouli is an amazing man. I have known him to be the most giving, responsible, honest and helping individual my wife, family and I have encountered in the past 20 years. When he says something he will always do it, never going back on his word or a promise.”

Rabbi Langer is in a good position to vouch for Mr. Cohen, because he knows him well, and is deeply involved in the Chabad community in San Francisco. He recounts that he met Mr. Cohen years ago when he was living in San Francisco, and states: “When my family and I were in need of help he was always there for us, through thick and thin. He is also a family man who loves his wife and kids and who is respected by those around him.” Rabbi Naparstek praises Mr. Cohen’s “wisdom, charm and good nature” and is deeply impressed by the extent of Mr. Cohen’s philanthropic activities.

Rabbi Danny Cohen of Hebron writes from afar to express his support for Mr. Cohen. As director of the Chabad Organization in the city of Hebron, Israel, Rabbi Cohen writes: “to testify that Mr. Cohen has been a very important support or of our organization’s work, supporting families in need and the learning of Jewish studies in different educational institutes.” Danny Cohen expresses his opinion that the defendant “is a man that will honor his word and not break the rules that will be set by the Court upon his release on bail.” (Exhibit “I”). These sentiments are echoed by Rabbi Spiegel. Id.

As Mrs. Cohen stresses in her letter, and as numerous writers inside and outside the family have stressed, the Cohens’ have devoted themselves to philanthropic activities, giving time and money to a broad range of worthy causes. Nearly all of the letters written to this Court in support of Mr. Cohen discuss what Mr. Alex Sandel refers to as Mouli Cohen’s “humanitarian instinct.”

Among these endeavors, Mr. Cohen organized a fundraiser for stem cell research in the wake of

the death of Stacy Cohen's mother from early onset Alzheimer's Disease, and fostered a matching grant from Intel's Andy Grove for the benefit of the only GMP stem cell facility in the United States. Additionally, many of the organizations supported by the Cohens focus on improving the lives of children. In this vain, Mr. Cohen has worked on an ongoing basis with Camp Okizu, a camp devoted to children with cancer and their families; has committed himself to the goal of reducing childhood blindness in third world countries through his support of the Childhood Vision Campaign; and supported Mount Sinai's adolescent health center, as well as a charity devoted to autistic children. Mr. and Mrs. Cohen also supported the arts, through donations to the Asian Art Museum, the SF MOMA, and the LA County Museum, and through Jerry Brown's School for the arts, which brings the arts into the lives of under-privileged children. These are causes which have imbued Mouli and Stacy Cohen's lives with meaning, and which further tie them to the community. (See Letters of Support, Exhibits "G" through "I").

IV. Mouli Cohen's Professional Background

Samuel Cohen's professional background is like that of so many creative, energetic and motivated businessmen; it is the success story of a self-made man. After high school, Mr. Cohen completed a three year commitment of compulsory military service in Israel. He then began his professional career, developing his knowledge in the business world through trial and error in several small business ventures in Israel. Following his arrival in the United States in 1987, Mr. Cohen focused his energies of the emerging high technology field, including successful healthcare and software startups. Mr. Cohen invested in and helped form several startup companies. These included Lamia Enterprises, Aristo International, which identified computer applications for consumer products, and Playnet, Inc., established to develop video games in bars and restaurants. In 1998, Samuel Cohen founded Ecast, an interactive media company offering digital music, games, entertainment, information and advertising through a network of electronic juke boxes,

1 found in more than 10,000 locations nationwide. This company has raised more than \$100 million
2 dollars in venture financing. Mr. Cohen served as Chairman and Chief Executive Officer of Ecast
3 until January 2002, and as Executive Chairman until October 2002, when he left the company.
4

5 In late 2003 – early 2004, Mr. Cohen formed ProCinea, an ambitious venture which
6 developed financial modeling software to forecast box office returns for motion pictures. This
7 venture utilized the services of respected academics and professionals and was highly regarded by
8 those familiar with development in the motion picture industry. It was ProCinea that attracted
9 many investors, Complainants Dillon, Glover and the Mills (Samuel and Mary Mills) among them.
10 There was nothing fraudulent about it and it ultimately went into decline only because of
11 developments in the motion picture industry. The project has not been abandoned; through various
12 transactions, the creditors of ProCinea now own the company's proprietary software, which has
13 been maintained by Mr. Cohen and his staff until the day when hopefully the concept can be
14 revived in a different financial atmosphere.
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17 In 2007, Mr. Cohen formed Voltage Capital (now Threshold Capital), a private investment
18 firm focusing on investment opportunities in the high technology, digital media and healthcare
19 sectors. Threshold Capital included portfolio companies with substantial net present values, which
20 held great promise. When Mr. Cohen was arrested, Threshold was in ongoing discussions for a
21 joint venture with Mannkind-Afreza to distribute a revolutionary new insulin inhaler for diabetics
22 in Southeast Asia, India, and China. Several countries in Asia as well as the Russian Federation
23 have experienced dramatically rising rates of Diabetes in their populations due to changes in the
24 traditional diets of their populations and other factors. At the same time, traditional methods of
25 insulin treatment are often prohibitively expensive and/or impractical to administer. Mr. Cohen's
26 efforts (through Threshold), were to create joint ventures with Western drug companies and local
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1 partners in the Asian countries to market alternative treatment methods, that would allow for oral
2 (inhaled) administration of insulin.

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4 Pear, Inc. envisioned collaboration with the world's largest diamond dealer, and intended to
5 launch an online retail service focused on diamond and jewelry sales. OnCirc Diagnostics is a
6 company co-founded by Mr. Cohen, acting through Threshold Capital Group, in 2009. On Circ is
7 a medical device company developing a system that would allow more precise and consistent
8 monitoring and diagnostics of hospital patients. The company's planned products and services are
9 based on technology exclusively licensed from the John Wayne Cancer Institute, a well-known
10 medical research institution, where the technology was originally developed. OnCirc's system is
11 based on an intravenous catheter to be used on hospital patients while the patients are in intensive
12 care or are otherwise receiving intravenous medication. OnCirc's catheter, in conjunction with an
13 automated screening system to which it is connected, monitors biologic agents in the patients
14 blood stream on a consistent basis throughout their hospital stay. While Mannkind and Pear were
15 effectively blocked from advancement by Mr. Cohen's arrest, OnCirc continues to grow and to
16 show great promise.

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18 Mr. Michael Reilly, CEO of OnCirc Diagnostics describes Mr. Cohen's hard work and
19 sustained effort in getting this Biotech startup, devoted to developing breakthrough cancer
20 diagnostics, off the ground. Mr. Reilly explained:

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23 "As you know, this period of time [the last two years] was marked by an economic
24 recession that has made it very difficult for biotech startups to find funding.
25 Finding and funding the right technologies is long difficult work and [Mr. Cohen]
26 has supported my efforts throughout the time period unlike many private equity
27 investors who are very short-term oriented. Throughout this time period, he was
28 very careful with expenditures in OnCirc, focusing on support of the project with
his energy, insight, and connections."

Mr. Reilly states that Mouli Cohen's support "ultimately resulted in the identification of new
oncology diagnostic technologies that can identify hidden circulating cancer cells in order to better

1 treat patients with metastatic cancer.” Discussing Mr. Cohen’s founding support of OnCirc, Mr.
2 Reilly states that “thanks to his efforts, a company was formed, financing found, and this
3 technology is now being discussed with a couple large pharmacuetical companies for
4 commercialization and availability to the general public.” He concludes that “Mr. Cohen’s release
5 would allow us to better continue this work and complete the studies necessary for FDA approval
6 and patient benefit.” (Letter of Michael Reilly attached hereto as Exhibit “I”).
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8 Danny Petrosak, a medical doctor and PhD met Mr. Cohen in connection with his work on
9 an ambitious project to help solve the problem of dehydration secondary to intestinal illness in the
10 third world. Dr. Petrosak, who is a visiting faculty associate in two departments at the California
11 Institute of Technology, has written to the Court that “I was impressed at once with Mr. Cohen’s
12 enthusiasm, natural scientific intuition, and desire to support impactful projects that would
13 promote welfare for those who are underserved.” Dr. Petrosak writes:
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16 I have had ample opportunity to observe Mr. Cohen in multiple business meetings
17 and conferences. He has always conducted himself with respect, kindness and
18 integrity. I have also on occasion witnessed his interaction with family and friends.
19 His devotion to his children, wife, family and friends takes precedent over any
20 business or other matter.

21 (Dr. Petrosak’s letter is attached hereto, as Exhibit “I”).
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23 In line with Mr. Cohen’s ongoing interest in medical breakthroughs and technology,
24 Collagen Detection, LLC, was formed by Mr. Cohen in 2009 to pursue development of a system
25 for early detection and diagnosis of osteoporosis. Osteoporosis is notoriously difficult to detect at
26 an early stage, and hence difficult to address by early preventative measures. Collagen Detection
27 intends to address that problem with a system consisting of a device for measurement of skin
28 collagen and a predictive computer monitoring system.

From this summary it should be apparent that the prosecution’s bald statement during the
Los Angeles bail/detention proceedings that Mr. Cohen has been involved in no lawful enterprises

in recent years is baseless. Mr. Cohen, utilizing his skills in developing financial support for fledgling companies, and helping to administer a fund for this purpose, has involved himself in numerous enterprises of great benefit and potential benefit to society.

V. The Bail Reform Act Supports Mr. Cohen's Pretrial Release on Reasonable Conditions

The Bail Reform Act, 18 USC § 3142, *et. seq.*, supports Mr. Cohen's release on reasonable conditions. Section 3142(b) states that a judicial officer shall order the pretrial release of a person on personal recognizance, or upon execution of an unsecured appearance bond, subject to specified conditions, "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." Subsection (c) states that the judicial officer shall order pretrial release subject to "the least restrictive further condition, or combination of conditions," that such judicial officer determines will reasonably assure the appearance of the person and the safety of any other person and the community, followed by a nonexclusive list of potential conditions of release.

Section 3142(e) sets forth the bases for a rebuttable presumption against release, in cases dealing with a crime of violence or other specified offenses. Finally, Section 3145(b), states that in the case of a detention order entered by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense, the person may file a motion with the Court having original jurisdiction over the offense, for revocation or amendment of that order; Section 3145(b) further states that the motion shall be determined promptly.

A. The Government's Showing Before the Magistrate Was Deeply Flawed and Did Not Support Pretrial Detention

In the instant case, there is no presumption in favor of pretrial detention, and Mr. Cohen presents neither a risk of flight nor a danger to the community. At the August 12, 2010 detention proceeding before Magistrate Nagle, the government asserted that such dangers exist, based on Mr.

1 Cohen's dual citizenship and history of international travel, his lack of assets in the United States,
2 and the presumptive sentence that Mr. Cohen would face is convicted of the charges in the
3 Indictment. The Court was informed that Mr. Cohen had not conducted a lawful business in many
4 years, and had, in substance devoted himself solely to fraudulent activities. As we demonstrate
5 herein, these claims and the proffers used to support them do not justify pretrial detention of Mr.
6 Cohen. But moving beyond the accusations in the Indictment or anything that had been previously
7 alleged, government counsel told the court that Mr. Cohen had even defrauded his own father-in-
8 law, Mr. Stripling, using the same Microsoft-Ecast scheme alleged in the Indictment, and,
9 according to brand new information, had defrauded one Javier Burillo, a business associate. These
10 accusations, made for the first time at the bail hearing, surprising defense counsel and giving him
11 no opportunity to prepare a response, were entirely false and scurrilous. We will respond to these
12 accusations in turn.

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15 First, as emphasized herein, Mr. Cohen has actually done nothing but legitimate work in
16 recent years, operating his fund and working to improve the lot of persons throughout the
17 community. The prosecutor who appeared at Mr. Cohen's initial bail proceeding in Los Angeles
18 on August 6, 2010, told the court that Mr. Cohen had sent "tens of millions of dollars overseas,"
19 while the prosecutor who appeared at the August 12, 2010 continued hearing claimed that Mr.
20 Cohen had exported three million dollars. Neither of these widely disparate claims find any
21 support in the evidence proffered by the government. The record would show that during the
22 banking crisis of 2009, Mr. Cohen transferred funds from his Wells Fargo accounts to his Credit
23 Swiss account, from which he paid regular business and personal expenses until he was satisfied
24 regarding the integrity of the banking system. This is all a matter of record, and there was no
25 surreptitious effort to hide funds anywhere. There were no tens of millions of dollars or even three
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1 million dollars exported by Mr. Cohen, and these unsupported claims of the government should
2 not be credited.

3 While the prosecution made much of Mr. Cohen's dual citizenship, it was not explained
4 how this factor creates a flight risk that cannot possibly be addressed by reasonable conditions of
5 release. Both Mr. Cohen's Israeli passport and U.S. passport are in the possession of his counsel,
6 who can either retain them, or turn them into the Clerk according to the Court's preference. In
7 neither case will they be available for his use. Additionally, the Israeli Consulate can be instructed
8 not to issue new travel documents to Mr. Cohen, even if he should request them, and to notify the
9 Court or government of any such request on his part. Mr. Cohen's wife, his former wife, and his
10 children all reside in this country. He has been a US citizen since 1996. There is simply no reason
11 to find Mr. Cohen to be an irremediable flight risk due to this factor.¹ The fact that Mr. Cohen has
12 traveled internationally should not count for anything in view of the proposed conditions of
13 release, which would absolutely foreclose such travel.
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17 The government complained earnestly before the Magistrate that Mr. Cohen had "no
18 assets" in this country. Presumably the government was referring to the fact that at the time of the
19 defendant's arrest, the Cohen's were living in an expensive rental property and that they do not
20 own residential or commercial real estate. It is true that ever since he came to this country, Mr.
21 Cohen has lived and worked in rented premises and has not purchased real estate. That is his
22 choice and it is a legitimate one. But lack of real estate ownership simply does not mean that a
23 person is devoid of substance and has no legitimate presence in the community. Mr. Cohen's
24 productive life has been involved with the development and acquisition of innovative and
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28 ¹ While there is a mechanism by which a person can divest himself of Israeli citizenship, in view of
all his strong ties to this country, Mr. Cohen should not be required to adopt this extreme remedy
on pain of detention.

1 promising companies. While in the normal course of business affairs some of these have failed,
2 others have prospered and grown beyond even his expectations. Ecast, already mentioned, is but
3 one example. As we have set forth above, at the time of Mr. Cohen's arrest on August 5, 2010, the
4 Threshold Fund had a net present value, according to accounting principles, of nearly \$90 million
5 dollars. Of course this does not mean that Mr. Cohen, as a principal of Threshold, had access to
6 funds approaching this amount, or that the companies constituting this asset had present liquidity.
7 Nevertheless, the Fund had genuine value based on realistic projections for these companies and,
8 as Mr. Reilly and Dr. Petrosak attest, Mr. Cohen's energy and guidance was a major reason for
9 this. Thus, the suggestion that Mr. Cohen just travels a lot and rents a big house but has nothing
10 going for him, is simply wrong.²

13 The charges made by the prosecutor, for the first time during the bail hearing, which
14 seriously impugned the character of Mr. Cohen, are palpably false. The accusation that Mr. Cohen
15 somehow defrauded Mr. Javier Burillo came out of the blue and is completely bewildering. At the
16 August 12, 2010 hearing, the prosecutor stated that Mr. Burillo had "just called" the government,
17 claiming to have been defrauded out of \$10 million dollars by Mr. Cohen. If Mr. Burillo indeed
18 made such an accusation, it is completely and totally without merit. Javier Burillo, a scion of one
19 of wealthiest families in Mexico, first invested directly into ProCinea through his family trust in
20 2006. He subsequently suggested that Mr. Cohen and he form an investment partnership, and in
21 2007 they jointly formed MCJB (Mouli Cohen-Javier Burillo), with each partner putting in

25 ² The government has made much of the very expensive rental property in Bel Air in which the
26 Cohen's resided before his arrest. We should point out, however, that these premises were
27 extensively used by Mr. Cohen for business purposes, where his staff met, interviews were
28 conducted, documents drafted, and present and prospective associates entertained. A fair portion
of the house was used in this way. Mr. Cohen has always sought to present an image of success
and achievement as an integral part of his business presentation. We do not think this is unusual or
wrong for a person in his position, and it is not a fact that justifies depriving Mr. Cohen of his
liberty pending trial.

1 approximately \$1.2 million dollars. MCJB invested in some experimental projects that did not pan
2 out and the partners lost money. Because of this, Mr. Cohen invited Burillo to participate in the
3 Voltage (now Threshold) Fund, which allowed him to participate in the development of companies
4 evolving under Voltage's guidance. As a lender to ProCinea, MCJB remains part of the creditor's
5 group formed to preserve and maintain the assets (principally software) developed for ProCinea.
6 All this is well-documented; there was no fraud involved anywhere.
7

8 It was Mr. Burillo who first informed Mouli Cohen in 2009 that a civil suit had been filed
9 against him by Mary and Samuel Mills growing out of the earlier Ecast investment they had made.
10 Burillo has been consistently supportive of Mr. Cohen and they have remained friends throughout
11 the course of the civil litigation. Within days of Mr. Cohen's arrest, he had friendly discussions
12 with Burillo, who has never suggested that he was defrauded in any way. All investments by Mr.
13 Burillo are documented and well-supported. There were no misrepresentations, and Mr. Burillo
14 has never alleged that there were. Therefore, we frankly do not know what the prosecutor was
15 talking about when making the assertions he did before the Los Angeles Magistrate.
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18 The prosecution's eleventh hour accusations regarding Mr. Cohen allegedly defrauding
19 Robert Stripling, the father of his wife Stacy, are completely untrue, and in fact, scurrilous. Some
20 years ago, Mr. Stripling, a Texas surgeon, decided to make a distribution of funds to his children
21 (Stacy and her brother) during his lifetime, rather than leaving the money to them upon his death.
22 He was apparently also motivated to make this distribution in part by the relatively recent marriage
23 of Stacy to Mouli Cohen. His assets, however, were tied up in an IRA. To avoid the penalties
24 associated with early withdrawal, it was decided that the distribution would be by way of a loan
25 out of the IRA to an entity, Signet Ventures, established by Mouli. Signet, an LLC, received the
26 funds in the form of a loan, and issued promissory notes for the loan amount. Regardless of the
27 form of this transaction, everyone associated with it regarded it as a way in which Mr. Stripling
28

1 could affect this payment to his daughter and her husband during his lifetime, without being
2 penalized for early withdrawal from his IRA. Merrill Lynch, which administers the Stripling IRA,
3 continues to monitor the status of the notes through Signet.
4

5 The genesis of the prosecutor's accusation appears to be as follows. Following the death of
6 his wife (Stacy's mother) after along period of dementia, Robert Stripling remarried a much
7 younger woman who became extremely angry that Mr. Stripling had provided for his children in
8 this way. Apparently this did not accord with her plans. She began to shut off all communication
9 with Stacy, even as Mr. Stripling himself became ill. This person kept Stripling isolated, largely
10 away from neighbors and others who had been friendly with the couple during Karen Stripling's
11 lifetime. She refused to let Stripling's children, particularly Stacy, speak with him. Stacy became
12 increasingly concerned as she learned from neighbors the extent of her father's illness, as
13 melanoma spread to his liver and part of his brain.
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15

16 At the same time, Stripling's new wife began claiming, to anyone who would listen, that
17 Stacy and her husband had wrongly acquired from Robert money she thought was rightfully hers.
18 Within the last year, Stacy, concerned about her father's illness and rumors about her step-
19 mother's control over him, tried to call but the step-mother made him hang up the phone. When
20 she tried to call again the line was disconnected. When she flew to Texas to see her father, this
21 woman slammed the door in her face. Eventually, Mr. Stripling became aware of her presence and
22 they were able to spend some time together. She accompanied him to some chemotherapy
23 treatments and renewed their bond as father and daughter. Since that time, however, the step-
24 mother has continued to prevent any telephone or other contact.
25
26

27 The information related by the prosecutor, obviously originating with this individual
28 (Stripling's second wife) is therefore based on a lie. The prosecutor said in court that, according to
this source, Mr. Cohen had acquired money from his father-in-law using the same Microsoft-Ecast

1 scheme alleged in the Indictment. These funds from Mr. Stripling were not an investment by him
 2 in anything, and no one who was aware of this event at the time regarded it as being any kind of
 3 investment, let alone something having to do with Ecast or Microsoft. This is simply a tragic
 4 family situation that has nothing to do with this case but was improperly exploited to cast Mr.
 5 Cohen in the worst possible light. It should not have been presented to the Magistrate, and it is
 6 entitled to no weight in this Court.
 7

8 When arguing before the Magistrate, the prosecutor kept on ratcheting up Mr. Cohen's
 9 supposed exposure under the federal sentencing guidelines, beginning with "\$30 million dollars"
 10 as alleged in the Indictment, but not shown by the facts as they are presently known, blithely
 11 adding \$10 million dollars based on the supposed last minute claims of Javier Burillo, and
 12 throwing into the mix several million dollars more, based on the false accusation about Mr.
 13 Stripling. The prosecutor told the Magistrate that Mr. Cohen faced "decades" in jail, or at least
 14 fifteen to twenty years. These claims were wildly extravagant, and were calculated to convince the
 15 Magistrate that Mr. Cohen's exposure was so great that his incentive to flee was correspondingly
 16 great, regardless of conditions imposed on his release. We do not read the sentencing guidelines
 17 the way the prosecutor does. Even crediting the \$30 million dollar claim made by the government
 18 (which we do not believe is supportable) it is difficult to envision a sentence of Mr. Cohen in a
 19 range theorized by the prosecutor. At the age of 52 he has never been accused of crime before and
 20 he has, to say the least, strong defenses to the present prosecution. He has little incentive to run
 21 from these charges, and every incentive to stay and fight them.
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 25 B. The Magistrate's Finding that Mouli Cohen Presents a Risk of Flight and Danger to
 26 the Community, and that No Conditions of Reason Can Mitigate this Danger, Was
 27 Not Supported by Even a Preponderance of the Evidence

28 The Magistrate's finding of flight risk was deeply flawed because the government
 proffered no legitimate evidence satisfying its burden of proof in this regard. We have already

1 discussed the inadequacy of that proffer and of the arguments advanced by the government in
2 support of detention. The Magistrate appeared unduly cynical about the arguments raised by
3 Defendant's counsel, mocking the suggestion that the government had "dithered" in arresting Mr.
4 Cohen, after showing its hand during his mediation trip to San Francisco. Defense counsel's point,
5 however, was not that the government "dithered" but rather than Mr. Cohen, with full knowledge
6 of the federal interest in him, and a clear warning that he may be arrested, took no step to flee the
7 jurisdiction. Engaging in pure and unsupported speculation, the Court opined that perhaps Mr.
8 Cohen had not run because he was "in denial" regarding his jeopardy. That suggestion is
9 completely unjustified and untrue.
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12 The court failed to credit Mr. Cohen's cooperation with the SEC and with the government
13 in her bail determination. The record is very strong in this regard. The Magistrate Judge had
14 before her abundant evidence of Mr. Cohen's voluntary cooperation with the SEC investigation of
15 the very transactions involved in this Indictment. He repeatedly produced documents requested by
16 the Commission, and submitted to a lengthy, exhaustive interview. Although the Court did not
17 have before it the SEC's letter closing the inquiry without charges, we have attached it here as
18 Exhibit "F." Counsel's showing of Mr. Cohen's repeated efforts to contact federal prosecutors and
19 the FBI in response to information that civil plaintiffs were trying to invoke their aid against Mr.
20 Cohen, was particularly strong and is similarly placed before this Court. (Exhibit "J"). Two
21 separate lawyers for Mr. Cohen made repeated efforts in this regard, speaking to the agent and
22 prosecutor whose names appeared through civil discovery proceedings as involved in the
23 investigation. All of these efforts were ignored by the FBI, and by the US Attorney's Office, both
24 of which refused to even acknowledge the existence of an investigation. When, during the San
25 Francisco mediation trip, it appeared that Agents may be preparing to arrest Mr. Cohen, his
26 counsel redoubled their efforts. It was made known to prosecutors that Mr. Cohen was available,
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1 that he was not going any place. Following his arrest, Mr. Cohen was interviewed by Agents, to
2 whom he readily revealed his banking information, which resulted in the prompt freezing of his
3 accounts. He did not conceal anything.
4

5 These were not the efforts of a person seeking to avoid arrest by running away. Rather,
6 they bespeak a desire to cooperate with authorities, as he did with the SEC, by answering their
7 questions and providing the information they needed to evaluate the claims being made against
8 him. Those claims, after all, arose from people with a personal interest in seeing Mr. Cohen
9 incapacitated and stripped of his resources by a federal prosecution, and were thus subject to
10 legitimate scrutiny by federal law enforcement. The Magistrate gave no consideration to these
11 cooperative efforts by the defense, before and after the arrest was made.
12

13 The Magistrate Judge too readily accepted the government's bald statements concerning
14 vast sums of money sent to Swiss accounts and secreted over seas, without requiring any proffer of
15 actual evidence that such was the case. The court placed undue emphasis on the defendant's dual
16 citizenship without considering readily available conditions that would keep him from traveling,
17 such as surrender of his travel documents. The court indulged in unsupported and unjustified
18 inferences against the defendant, such as the suggestion that he must have been "in denial" when
19 he failed to run away and failed to consider available conditions of release, such as travel
20 restrictions, electronic or GPS monitoring, reporting requirements, and the custodianship of
21 another person to mitigate the risk of flight. The Court erroneously considered "economic danger"
22 to the community as a basis for detention when, as pointed out by defense counsel, that would not
23 constitute an independent ground to detain the defendant. For all of these reasons, the Magistrate's
24 ruling was flawed and the order of detention should be vacated.
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C. The Bail Reform Act Factors Favor the Defendant's Release

The Bail Reform Act of 1984 speaks in terms not of absolute guarantees, but rather of reasonable assurances. See *United States v. Tortora*, 922 F.2d 880, 884 (1st Cir. 1990). Our Court of Appeals has made clear that “[d]oubt regarding the propriety of release should be resolved in favor of the defendant.” *United States v. Motamedei*, 767 F.2d 1403, 1404-1405 (9th Cir. 1985); *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990). Although we sometimes lose sight of the limited reach of the pretrial detention authorized by the Bail Reform Act, the cases make clear that a person arrested for a non-capital offense should ordinarily be permitted to bail, and only in rare circumstances should release be denied. *Townsend, supra.*, 897 F.2d 994; *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991).

Under these circumstances, at this stage of the proceedings, it cannot be said that the seriousness of the charges or the strength of the evidence preponderates against Mr. Cohen's release. As the Court has recognized, these factors are in any event entitled to the least weight of any of the Section 3142(g) factors listed in the Bail Reform Act. *United States v. Motamedei, supra*, 767 F.2d at 1408; *United States v. Honeyman*, 470 F.2d 473, 474 (9th Cir. 1972). As the Court reminded us in *Motamedei*, “the statute neither requires nor permits a pretrial determination that the person is guilty” of the charges brought by the government. *Motamedei, supra*, at 1408; *United States v. Chen*, 820 F. Supp. 1205, 1207 (N.D.Cal. 1992). Here we have emphasized the weakness of the prosecution's case and the existence of strong, viable defenses.

When one passes to a consideration of the history and characteristics of the accused, including involvement in and ties to the community, we believe that the balance shifts heavily in favor of Mr. Cohen. Mr. Cohen provides with this motion letters from persons attesting to his kindness, generosity, and deep involvement in the most positive philanthropic activities in the community. Mr. Cohen's wife and children live in the United States. The business activities

1 through which he has sustained himself for a quarter of a century are in the United States. His
 2 “lifestyle” to which the government objects has not changed in recent years after he came into
 3 contact with the persons now falsely accusing him of fraudulent conduct. He has consistently
 4 maintained a similar lifestyle for many years, obviously regarding it as beneficial to his business
 5 activities. The big house emphasized by the government was extensively used for business
 6 purposes, contained an office and an office staff who regularly met and conducted their activities
 7 there. Mr. Cohen chooses to rent rather than buy real estate because that is simply his choice, and
 8 it is both a reasonable and lawful choice. The letters submitted herewith demonstrate the positive
 9 impact Mr. Cohen has had on the community and the strength of his commitment to the
 10 worthwhile projects being pursued by highly qualified individuals such as Dr. Petrosak and Mr.
 11 Reilly.

14 **VI. Proposal for Release on Reasonable Conditions**

15 Mr. Cohen should be released on reasonable conditions. We submit to the Court that the
 16 following assurances and conditions would be reasonable in this case. If Mr. Cohen is released
 17 pretrial, a man of substance and integrity has offered to allow Mr. Cohen and his wife, Stacy, to
 18 live in his family home. He will act as a third-party custodian of Mr. Cohen, insuring that he
 19 attends all court appearances, and abides by all conditions of release. Stacy Cohen has already
 20 moved into the custodian’s home. He has written a thoughtful letter to the Court indicating a full
 21 awareness of his undertaking and explaining why he believes in Mr. Cohen and is willing to help
 22 him gain his release as he prepares for trial.

25 Mr. Cohen’s passports can remain in the possession of undersigned counsel, or can be
 26 turned in to the Clerk of the Court if that is the preferred course, and thus will not be available to
 27 Mr. Cohen for travel purposes. We propose that as additional conditions of release, Mr. Cohen be
 28 required to report regularly to pretrial services, that he submit to electronic monitoring or GPS

1 surveillance, so that his whereabouts will be known; that his travel be restricted to the Northern
2 and Central Districts of California; that Mr. Cohen's custodian be sworn to inform the Court of
3 violations of bail conditions; and that Mr. Cohen refrain from attempting to obtain any new travel
4 documents without the Court's express permission. Additionally, Roger and Judith McAulay have
5 offered to post a substantial financial security, in the form of \$600,000 of equity in their family
6 home, for purposes of Mr. Cohen's bail. This home is the personal residence of the McAulay's and
7 their children, and it is extremely important to them. Their willingness to post it as bail security
8 for Mr. Cohen bespeaks their faith in him and their firm belief that he will honor his commitments
9 to the Court if released.
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11

12 We believe that these additional conditions, which were not before the Magistrate in Los
13 Angeles, are ample to reasonable assure Mr. Cohen's presence when required in Court.
14

15 CONCLUSION

16 For the reasons stated herein the defense respectfully requests that the Court authorize Mr.
17 Cohen's release from jail confinement, on reasonable conditions.

18 Date: October 6, 2010

Respectfully submitted,

20 /s/ William L. Osterhoudt
21 WILLIAM L. OSTERHOUDT,
22 Attorney for Samuel Cohen
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PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 135 Belvedere Street, San Francisco, California 94117.

On the date set forth below, I caused to be served the foregoing **DEFENDANT SAMUEL COHEN'S NOTICE OF MOTION AND MOTION TO VACATE DETENTION ORDER AND TO ADMIT THE DEFENDANT TO BAIL ON REASONABLE CONDITIONS; POINTS AND AUTHORITIES IN SUPPORT** on all interested parties in this action by causing same to be served electronically to the following:

AUSA **Jeffrey Finigan** at email address: Jeffrey.Finigan@usdoj.gov

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 6, 2010 in San Francisco, California.

/s/ Dolores T. Osterhoudt
Dolores T. Osterhoudt